SIME ENGINEERING SDN BHD

v.

RM LEOPAD SDN BHD (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[CIVIL SUIT NO: D1-24-129-2004]
1 DECEMBER 2004

COMPANY LAW: *Winding-up - Injunction to restrain petition - Petition based on alleged debt - Whether defendant company bears burden of establishing status as creditor - Whether debt bona fide disputed - Whether there were triable issues - Whether a debtor-creditor relationship successfully established - Whether petition an abuse of process of court - Companies Act 1965, s. 218*

CIVIL PROCEDURE: *Injunction - Injunction to restrain winding-up petition - Petition based on alleged debt - Whether defendant company bears burden of establishing status as creditor - Whether debt bona fide disputed - Whether there were triable issues - Whether a debtor-creditor relationship successfully established - Whether petition an abuse of process of court - Companies Act 1965, s. 218*

This was an application by the plaintiff company for an injunction restraining the defendant company from presenting a winding-up petition based on a notice issued under s. 218(1)(e) read in conjunction with s. 218(2)(a) of the Companies Act 1965 ('the Act'). The plaintiff had subcontracted certain building construction works to one Miya Engineering Sdn Bhd ('Miya'), which in turn had engaged the defendant to do some scaffolding works. However, Miya's services were terminated and when Miya defaulted in paying the defendant, the defendant, through the aforesaid s. 218 notice, demanded payment from the plaintiff on the basis of a letter dated 6 August 2001 written by the plaintiff to Miya ('the said letter').

The plaintiff admitted that it had made certain payments pursuant to an arrangement effected between the plaintiff and Miya, and its principle ground in support of its application was that the alleged debt was strenuously disputed as there was no privity of contract between the plaintiff and the defendant since the said letter clearly indicated that the said arrangement to pay was made between the plaintiff and Miya, and not the defendant. Hence, there was no contract between the plaintiff and defendant to assume Miya's debt. The defendant's contention was that the plaintiff's liability was based on the said letter, which stated that the plaintiff would pay the defendant all monies due from Miya if for any reason Miya failed to pay the defendant.

Held (allowing the application):

[1] Unlike the law pertaining to a shareholder's winding-up petition – where the company which moves for an injunction would have to show that the shareholder's intended petition to wind-up the company is bound to fail – a creditor who intends to wind-up a company must bear the burden of having first to establish his 'creditor' status by making out a case to the satisfaction of the court, either that the debt as specified (subject to the application of the *deminimis non curat lex* principle) in the s. 218 notice has been admitted or is clearly not *bona fide* disputed, considering the undisputed contemporaneous document or documents adduced in the supporting affidavit(s). Thus, the defendant in the current case had to make out a cogent case that the debt stated in the s. 218 notice was due and owing to it. (pp 283 g-h & 285 g)

[2] It was common ground that there was no written or oral contract entered into between the plaintiff and the defendant where the plaintiff had undertaken to assume or bear the contractual liability of Miya *vis-à-vis* the defendant, there being neither a novation or a subrogation agreement here. Hence, the question of lack of privity of contract between the plaintiff and the defendant was in serious contention. It was trite law that a party assisting a third party to meet its financial obligations to a second party does not bind the party with privity of contract with the second party, *a fortiori*, as in the instant case, where the payments had been made perforce and merely to the account of Miya. (p 286 d-f)

[3] The plaintiff's contention that there was never any privity of contract between the plaintiff and the defendant was consistent with the fact that although the defendant's invoices with Miya dated back to 25 July 2001, it was only in March 2004 (some two years and 10 months later) that the defendant had made the first demand to the plaintiff for payment. Indeed, excerpts from a series of contemporaneous documents and the conduct of the defendant itself would bear out the contention that the plaintiff had never been considered a debtor. (p 287 c)

[4] Consequently, there were *bona fide* and substantial disputes on the defendant's alleged claim, and the defendant had failed to establish a debtor-creditor relationship between the plaintiff and the defendant. Hence, no question arose as to the plaintiff being "unable to pay" or having "neglected to pay" within the meaning and purport of s. 218(2) of the Act. This was an abuse of the process of the court, as the intention of

the defendant was to bring unwarranted pressure to bear on the plaintiff to settle a vigorously and cogently disputed debt. The injunction, as prayed for by the plaintiff, was therefore allowed. (pp 287 h & 288 a)

Case(s) referred to:
American Cyanamid Co v. Ethicon Ltd [1975] 1 All ER 504 ***(refd)***
Bryanston Finance Ltd v. de Vries (No 2) [1976] Ch 63 ***(refd)***
Burghes v. Attorney-General [1911] 2 Ch 139 ***(refd)***
Charles Forte Investments Ltd v. Amanda [1964] Ch 240 ***(refd)***
Dyson v. Attorney-General [1911] 1 KB 410 ***(refd)***
Gouriet v. Union of Post Office Workers [1978] AC 435 ***(refd)***
Guaranty Trust Co of New York v. Hannay & Co [1915] 2 KB 536 ***(refd)***
JB Kulim Development Sdn Bhd v. Great Purpose Sdn Bhd [2002] 2 CLJ 345 HC ***(not foll)***
Re Cuthbert Cooper & Sons Ltd [1937] Ch 392 ***(refd)***
Sri Binaraya Sdn Bhd v. Golden Approach Sdn Bhd [2000] 7 CLJ 320 ***(not foll)***
Tan Choon Keng Realty (Pte) Ltd v. Tang Wee Cheng [1992] 2 SLR ***(refd)***

Legislation referred to:
Companies Act 1965, s. 218(1)(e), (2)(a)
Rules of the High Court 1980, O. 14, O. 18 r. 19

Companies Act 1948 [UK], s. 222(f)
Companies Act [Sing], ss. 216, 254
Rules of the Supreme Court [UK], O. 18 r. 9(1)(d), (3), O. 25 r. 5

For the plaintiff - HL Choon; M/s Raja, Darryl & Loh
For the defendant - Paul Ong (Olivia Ho & SY Lim); M/s Paul Ong & Assoc

Reported by Suresh Nathan

JUDGMENT

Vincent Ng J:

Plaintiff's Case For Injunction

The plaintiff company applied for an injunction to restrain the defendant company from presenting a winding-up petition based on a notice issued under s. 218(1)(e) read in conjunction with s. 218(2)(a) of the Companies Act 1965 (the Act). The plaintiff subcontracted certain building construction works to Miya Engineering Sdn Bhd (Miya), who in turn engaged the defendant to do some scaffolding works. However, around August 2001, Miya's services were terminated. When Miya defaulted in paying defendant, the defendant, through the aforesaid s. 218 notice, demanded payment from plaintiff on the basis of a letter dated 6 August 2001 written by the plaintiff to Miya. The plaintiff admitted that certain payments had been made by them pursuant to an arrangement effected between the plaintiff and Miya. The plaintiff's principle

ground in support of their application for an injunction is that the alleged debt is strenuously disputed as there was no privity of contract between the plaintiff and the defendant since the said letter clearly indicates that the said arrangement to pay was made between the plaintiff and Miya and not the defendant. There was thus no contract between the plaintiff and defendant to assume Miya's debt. The plaintiff explained that their arrangement with Miya was that, only if there were moneys due from the plaintiff to Miya that such moneys were to be paid by plaintiff directly to the defendant to account of the moneys due from Miya to the defendant. However, after the plaintiff had made several payments to the defendant there were no such moneys due from the plaintiff to Miya. This explains the reasons why the defendant's demand to the plaintiff was only made about three years after the alleged default in payment by Miya. Finally, it is contended that if the defendant is allowed to file a winding-up petition it would result in severe and irreparable damage to plaintiff, and the plaintiff is a solvent company with ample ability to pay its debts.

Defendant's Case Against Injunction

The defendant's contention is that the plaintiff's liability is based on the letter of undertaking dated 6 August 2001 which states that the plaintiff will pay defendant all monies due from Miya if for any reason Miya fails to pay the defendant. This, according to them, is consistent with the fact that the plaintiff had made certain payments to the defendant on behalf of Miya. Defendant further alleged that the plaintiff only denied their liability to settle Miya's debt after the project was completed, whereas the plaintiff made part payments directly to the defendant when the project was still in progress, thus implying that the plaintiff's conduct is inequitable.

The Law On Injunctions To Restrain The Filing Of Winding-up Petitions

Before me learned counsel for the defendant, Mr. Paul Ong, opened his submission with the following startling words: "In deciding whether to grant an injunction against the filing of a winding-up petition under s. 218(1)(e) read with 218(2) of the Act, the touchstone consideration that this court would have to undertake, is whether the defendant's claim is bound to fail"; in other words, the onus is thrown upon the plaintiff to satisfy the court that the defendant's claim is bound to fail – before it could succeed to secure an injunction. In support of this application for injunction learned counsel cited the following five authorities, namely:

(a) *Charles Forte Investments Ltd v. Amanda* [1964] Ch 240; [1963] 2 All ER 940 *(Charles Forte)*

(b) *Bryanston Finance Ltd v. de Vries (No. 2)* [1976] Ch 63; [1976] 1 All ER 25 *(Bryanston Finance)*

(c) *Tan Choon Keng Realty (Pte) Ltd v. Tang Wee Cheng* [1992] 2 SLR *(Tan Choon Keng Realty)*

(d) *Sri Binaraya Sdn Bhd v. Golden Approach Sdn Bhd* [2000] 7 CLJ 320 *(Sri Binaraya)*

(e) *JB Kulim Development Sdn Bhd v. Great Purpose Sdn Bhd* [2002] 2 CLJ 345 *(JB Kulim)*

Cases *Charles Forte* and *Bryanston Finance* are English Court of Appeal decisions, whereas *Tan Choon Keng Realty* is a Singapore decision of his Lordship Chan Sek Keong J (as he then was), and *Sri Binaraya* and *JB Kulim* are decisions of our High Courts (Malaysian cases).

Upon careful reading of *Charles Forte, Bryanston Finance* and *Tan Choon Keng Realty*, I find that the above 'bound to fail' proposition of law advanced by learned counsel for this court's consideration is premised on manifest flaws of reasoning, nay, misreading and misapplication of *Charles Forte, Bryanston Finance* and *Tan Choon Keng Realty*, all of which cases, I must hasten to add, were decisions based on sound reasoning and law.

The genesis of the similar views expressed in *Bryanston Finance* and *Tan Choon Keng Realty* is an earlier decision of the English Court of Appeal in *Charles Forte*. It is indeed remarkable that the rationally and legally correct ratio common in all these three authorities have thrown certain bewildering minds into a state of undue bewilderment, which have led to the counsel's aforesaid proposition of law; in his attempt to apply the principles that are essentially applicable to a shareholder's winding-up petition to that of a creditor's petition.

Now, let us set out the factual matrix of the three leading cases of *Charles Forte, Bryanston Finance* and *Tan Choon Keng Realty* on this branch of law pertaining to granting of injunctions to restrain the filing of winding-up petition.

All petitions for winding-up of companies under the Act could broadly be divided into only two categories, namely: petitions instituted by shareholders of a company, or petitions by creditors of the company. In the face of threat by a shareholder or a creditor to wind-up a company, the company may move the court for an injunction by invoking a facet the court's inherent jurisdiction to prevent a would-be litigant from abusing its process. It is important to distinguish this specie of injunction (the first or non traditional specie) from the other specie (the second or traditional specie), where the court's jurisdiction

is invoked to restrain a party from taking some action which is alleged to be in violation of the litigant's legal right until the court has decided whether he has that right and whether it has been or will be violated. Thus, clearly, unlike the second specie, the first specie should not be described as an interlocutory or interim injunction, for as soon as the court has decided whether or not to grant the injunction the proceeding is at an end and there is nothing left to try – in other words, there is no cause of action left to be later tried. Indeed, in my view, no cause of action in the conventional sense, need be pleaded in the case of the first specie of injunction; though to my surprise, some lawyers have submitted otherwise before me. Similarly, in cases where declaratory reliefs are sought, no cause of action in the traditional sense need to exist. This principle was first enunciated in the landmark cases of *Dyson v. Attorney-General* [1911] 1 KB 410; [1912] 1 Ch. 158. The decision and spirit of *Dyson* served to guide the courts in subsequent cases, and to encourage resort to declaratory proceedings. In *Burghes v. Attorney-General* [[1911] 2 Ch 139 at 155] – decided shortly after *Dyson* case – Warrington J held that O. 25 r. 5 (English Rules) was intended to deal with the very case where there was no cause of action. And, in *Gouriet v. Union of Post Office Workers* [1978] AC 435 at 501, Lord Diplock felt that the position was now so clear that he said: "The early controversies was to whether a party applying for declaratory relief must have a subsisting cause of action or a right to some other relief as well can now be forgotten." (See also *Guaranty Trust Co of New York v. Hannay & Co* [1915] 2 KB 536.)

It stands to reason that since the first specie of injunction is not grounded upon any cause of action for subsequent adjudication and the injunction sought is not in the nature of an interim or interlocutory injunction, the principles established in *American Cyanamid Co v. Ethicon Ltd* ([1975] 1 All ER 504; [1975] 2 WLR 316, HL), which places an onus on the plaintiff to prove that there is a serious issue to be tried in his action and on the balance of convenience, are inapplicable. In this regard, I think it is apposite here to set out the brilliant ratiocination of Stephenson LJ in *Bryanston Finance (supra)* as expressed logically in the following language (at pp. 36 and 37):

> There, in my opinion, the judge attempted to do an impossible thing: to decide on the balance of convenience whether there is an abuse of the process of the court. He was persuaded to confuse two distinct things: (1) the court's jurisdiction to prevent a would-be litigant from abusing its process; (2) the court's jurisdiction to help a would-be litigant by preventing another from taking some action which is alleged to be in violation of the litigant's legal right until the court has decided whether he has that right and whether it has been or will be violated. Completely different considerations apply to the two

cases. In the first it is for the plaintiff to prove that the defendant's exercise of his right to bring legal proceedings is in fact an abuse of process; in the second it is for the plaintiff to prove that there is a serious issue to be tried in his action, not the defendant's, and that it is convenient that the court should intervene to restrain the defendant before it is tried.

It is the practice for a company which objects to a shareholder improperly presenting a petition to wind it up to move for an injunction to restrain him. The court's jurisdiction to do so is a facet of his inherent jurisdiction to prevent an abuse of its process: *Charles Forte Investments Ltd v. Amanda* ([1963] 2 All ER 940; [1964] 1 Ch 240) and *Mann v. Goldstein* ([1968] 2 All ER 769; [1968] 1 WLR 1091).

And, his Lordship further said:

Counsel for the plaintiff company sought support for the judge's approach and order in the concluding sentence of the judgment of Jessel MR in *Niger Merchants Co v. Capper* ([1877] 18 Ch D 557 at 559). He claimed support there for his submission that the injunction he prayed was only interlocutory, that there was a serious issue to be tried after it had been granted or refused, and that at this stage the balance of convenience had therefore to be considered and the *American Cyanamid* case applied. But the hearing to which the sentence refers was clearly a hearing of conflicting evidence on the question whether Mr. Capper did threaten the company with winding-up, which he denied, and that case is no authority for the proposition that a plaintiff company, which moves for an injunction to restrain the presentation of a petition to wind it up as an abuse of the process of the court, can rely on a balance of convenience and reserve its evidence to prove the abuse until the question whether it is an abuse is finally decided at the trial of the action. I agree with Sir John Pennycuick, whose judgment I have had the privilege of reading, **that it is finally decided at this stage and there is nothing left to try.**

This is not 'an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right', but to restrain a defendant from exercising his legal right to present a petition. So Lord Diplock's words in the *American Cyanamid* case which Buckley LJ has quoted do not apply to such an application as this. Their Lordships do not seem to have had this sort of injunction in mind and they cannot have overruled *Forte*'s case by implication. *Forte*'s case still binds us to hold that unless the plaintiff company can prove that a petition is bound to fail – **or perhaps that there is a suitable alternative remedy to a petition** – Mr de Vries cannot be restrain, even temporarily, from presenting it. Oliver J has found that it might succeed. (emphasis added)

The distinctive nature of the first specie of injunction to restrain abuse of process of the court is also aptly and succinctly put in *Bryanston Finance* by another member of the appeal board, Sir John Pennycuick, who said (38 at j):

> I should like to add that where a company seeks relief of this kind the procedure by way of writ claiming an injunction to restrain presentation of a petition, followed immediately by a motion expressed to claim an interlocutory injunction in the same terms, appears clumsy and inapposite. It occurs to me that it should be possible to devise some more apt form of procedure, for instance, an originating motion in the Companies Court.

For the purpose of the present judgment it is pertinent to note that *Bryanston Finance* concerned injunction sought by Bryanston Finance Ltd (the plaintiff) against one Juda de Vries (the defendant) who held 62 shares in a Bryanston Finance Ltd whose issued capital was 7,414,938 shares. The plaintiff moved the court for an injunction after its chairman and managing director received a letter in February 1975 from the defendant stating that if no reasonable reply or explanation were received within two days, to the various questions raised by him relating to an entry in the 1973 company accounts, he would petition to wind-up the company under s. 222(f) of the Companies Act 1948 (English Act) on the ground that it is just and equitable to do so. There were other roll-over (quite immaterial here) procedural developments in the continuing saga of skirmishes waged by this paltry shareholder and the chairman cum managing director of the plaintiff company which resulted in its two injunction applications.

Tang Choon Keng Realty which followed *Bryanston Finance*, also concerned the case of a shareholder and director, one Tan Wee Cheng (the defendant) who threatened to proceed to file a petition for the winding up of Messrs Tan Choon Keng Realty (Pte) Ltd (the first plaintiff) under s. 216 and/or s. 254 of the Companies Act (Cap 50, 1990 Ed) unless the second and third plaintiff (the defendant's brothers who were also shareholders and directors of the first plaintiff) could come up with constructive proposals to resolve the conflict between the parties. In *Tan Choon Keng Realty*, with particular reference to the question of whether it would be unjust to shut out a shareholder from exercising his statutory right, Chan Sek Keong J (as he then was) took a strikingly distinctive rhetorical approach to this issue in his judgment, under 'General considerations' which is worth quoting (p. 1124 at H and 1125 at B to F):

Before I examine these decisions, I should like to make the following preliminary observations in order to put the problem in its proper perspective:

...

(5) if, at the hearing a permanent injunction is granted, no injustice will have been done to TWC; but, if the court refuses to grant the injunction, TWC will still have to file his petition/s, and TCKR and/or TWS and TWK may or may not be able to oppose the petition/s, depending on whether issue estoppel operates and that may depend on the reasons given for the refusal;

(6) moreover, the plaintiffs will be entitled to appeal against a refusal to grant a permanent injunction, and, given the circumstances of the case, are likely to do so; in any case, the right of appeal exists;

(7) consequently, no aggrieved shareholder, unless he has financial resources and also the will, may be in a position to obtain any remedy from the court for any wrong that a company may have done to him, and if he has, it may take him a long time to obtain his remedy;

(8) in these circumstances, the following public policy considerations need to be considered:

(a) should litigation of this nature be extended or prolonged in this way? (b) should the court put itself in a position to hear a dispute twice when it can do so once? (c) should a minority shareholder, who may not have the same financial resources as the company, be denied equal access to the court by the company resorting to a pre-emptive strike of this nature? (d) should potential or actual irreparable loss to a company and its related companies be a countervailing factor against the right of a shareholder to protect his rights as a member? (e) how should the court balance the two conflicting interests?

Most certainly, their Lordships must have mulled over the obvious answers to the potent Socratic questions such as those posed by Chan Sek Keong J in para. 8 above, that the English Court of Appeal were driven to adopt the 'bound to fail' test in *Forte* and *Bryanston*.

In *Charles Forte*, Amanda (the defendant) who was a shareholder of Charles Forte Investments Ltd (the plaintiff company)) wrote a letter to the company threatening to present a winding-up petition if the company refused to register the transfer of those shares sold by Amanda to third parties. In this case, Pennycuick J refused to continue the injunction. However, on appeal, the Court of Appeal allowed the appeal on the grounds, *inter alia*, that as the directors had an absolute and uncontrolled discretion not to register the transfers, the

petition was bound to fail, unless the directors had acted in bad faith, and there was no possible chance that Amanda could make good his allegations in that respect. And, most importantly, that even if Amanda's allegations could be substantiated, **a winding-up petition is unnecessary as there were alternative and more suitable remedies, namely, an action for ratification of the register.** applying *Re Cuthbert Cooper & Sons, Ltd* ([1937] Ch 392) which the court held was binding on them.

Though I am completely *ad idem* with both the rationale and *ratio decidendi* in *Charles Forte, Bryanston Finance* and *Tang Choon Keng Realty* which declared that the principles laid down in *American Cyanamid* case is inapplicable to the first (non traditional) specie of injunction applications, yet nevertheless, the pertinent issue in an application for injunction against an alleged creditor (as in the instant case) is whether a distinction ought to be made, in this court's approach when considering whether to grant an injunction against a shareholder as opposed to a creditor of the company.

Clearly, in my considered view, the 'bound to fail' ratio established in *Charles Forte, Bryanston Finance* and *Tan Choon Keng Realty* – all of which cases concern shareholders' winding-up petitions – should not be read as decisions applicable to creditors' winding-up petitions (for debts) under s. 218(1)(e) read with s. 218(2)(a) of the Act. Surely, the language and reasoning in these three cases indicate that those cases are no authority for the proposition that the onus is on a plaintiff company, which seeks an injunction against the presentation of a winding-up petition grounded upon an alleged debt claimed by a creditor, to satisfy the court that the creditor's claim is bound to fail. It is important to note that the rationale in all the three decisions are predicated upon the question of a shareholder's statutory right to protect his rights as a member of the company rather than the right of a creditor of a company to enforce his debt-claim through a petition to wind-up the company.

I am of the considered view, and I hold that, unlike the law pertaining to a shareholder's winding-up petition – where the company which moves for an injunction would have to show that the shareholder's intended petition to wind-up the company is bound to fail – a creditor who intends to wind-up a company must bear the burden of having first to establish his 'creditor' status by making out a case to the satisfaction of the court, either that the debt as specified (subject to the application of the *deminimis non curat lex* principle) in the s. 218 notice, has been admitted or is clearly not bona fide disputed, considering the undisputed contemporaneous document or documents adduced in the supporting affidavit(s).

My reasons for this view are:

(1) The right of a shareholder to petition the companies court for a winding-up order in appropriate circumstances is a specific and pointed right conferred by statute. Indeed, the fact that he has locus as a shareholder is never disputed, whereas an alleged creditor has no locus under the Act unless he is able to first establish to the satisfaction of the court that he is a creditor, as the debt is due and owing by the company to him. An alleged creditor has no locus under the Act unless he is able to first satisfy the court as to his status as a creditor by virtue of the fact that the debt is due and owing to him. The words 'debts' in s. 218(i)(e) and 'a creditor' in s. 218(2)(a) are words of weighty significance, and it is axiomatic that there cannot be a debt without a creditor.

(2) Unlike a shareholder whose right of relief is primarily or exclusively prescribed within the four corners of the statute, namely, the Companies Act 1965, a creditor is clothed with ample recourse to seek relief in the common law courts which is normally and quite invariably done. Thus, it is pertinent to note that even when an injunction is sought against a shareholder of a company, the courts have held that if it could be demonstrated that the shareholder has a more appropriate alternative remedy, for example, ratification of the register of the company, as in *Charles Forte*, the court would favour the company with an injunction.

(3) Should this court rule that, to secure an injunction against the filing of a winding-up petition, the onus is on the company sought to be wound-up to satisfy the court that the creditor's claim is 'bound to fail', most litigants who claim to be creditors would take the short-cut petition for winding-up route to enforce their claims rather than to have recourse to the common law courts. Indeed, such heavy onus of proof if placed on the company would result in the companies court being inundated with a welter of winding-up petitions, which may lead to irretrievable damage to a company's business and reputation, and far-reaching effects consequential upon the ensuing mandatory gazettal and advertisement entailed in a petition. The courts must firmly deprecate such proclivity for shortcuts in normal recovery of debts. Surely, the punch-line of this judgment could be stated thus: in a common law civil action the standard of probity and cogency required of a plaintiff (the defendant here) in order to succeed in his O. 14 application for summary judgment is markedly higher than the 'bound to fail' test if the onus of such test is instead thrown upon a defendant (the plaintiff here) in a civil action.

From the foregoing reasons I am constrained to conclude, with the greatest respect, that the two Malaysian cases *Sri Binaraya* and *JB Kulim*, which concern creditors' winding-up petitions, were decisions – grounded upon the 'bound to fail' test – that were amiss in rationale and based on wrong application of *Charles Forte* and *Bryanston Finance*; a methodical and analytical rather than a quote-and-apply approach ought to have been adopted in decision making process on intricate issues such as the present. In *Sri Binaraya*, a creditor claimed an alleged debt of RM2,108,820.22 from the company for a construction work and *JB Kulim* concerns a claim for RM853,015.79 by the defendant in respect of a construction project where the defendant was appointed by the plaintiff company as a contractor. Indeed, in *Sri Binaraya*, the matter before the learned judge was a motion filed by the company to move the court to strike the winding-up petition under O. 18 r. 19 Rules of the High Court 1980 and not an application for injunction. Notably, there is unequivocal dicta in *Bryanston Finance* which proscribes the invocation of the principles in *American Cyanamid* in striking out applications, as Stephenson LJ had this to say: "... the method of applying does not transform the substance of the proceedings or the nature of what the applicant has to prove. If he applied to strike out the petition under the inherent jurisdiction, or under RSC O. 18 r. 9(1)(d) and (3), he would not be able to rely on anything said by the House of Lords in *American Cyanamid Co v. Ethicon Ltd* or on the balance of convenience; ...".

Thus, shortly put, the 'bound to fail touchstone' onus on the company proposed by counsel at the outset of the present case is, I would say, rather stonedead. Those being the principles I have set out, I come now to apply to the facts which have been alleged here.

Bearing in mind that in such cases the onus is cast upon an alleged creditor to prove that the company is indebted to him, the defendant company in the current case has to make out a cogent case that the debt stated (subject to the application of the *deminimis non curat lex* principle) in the s. 218 notice is due and owing to them. I shall now embark on a forensic analysis of contemporaneous documents to determine whether the sum demanded in the s. 218 notice has been admitted or, is clearly not been *bona fide* disputed by the plaintiff company. If the alleged debt is not sufficiently made out, then it is not a 'creditor' envisaged in s. 218(2)(a) and its threat to wind-up the company is an abuse of the process of the court, because its real purpose is not to wind-up the company but to secure payment of the disputed debt without recourse to the common law court.

The sole thrust of the defendant's case is found in para. 6 of the affidavit in reply of Sunderaj a/l Nagalingam (encl. 7), which states that the plaintiff had agreed to pay the defendant monies due and owing by Miya for all scaffolding works carried out by the defendant on behalf of Miya in the project. In support of this contention the defendant adduced a letter dated 6 August 2001 (exh. 'SN1' of encl. 7) written by the plaintiff but addressed to Miya Engineering (M) Sdn Bhd. The 2nd and 3rd paragraphs of the letter exh. 'SN1' read:

> Miya shall continue to build scaffold of the type stated in the attachment without deviation. All scaffold are to comply to the Site Regulations and SSC's (Plaintiff's) Safety Management System including the Program.
>
> Miya has consented that in the event Leopard do not receive payment as per the order, SSC shall make direct payment to Leopad. All costs shall be for the account of Miya.

It is crucial to note that this letter was written by the plaintiff to Miya rather than to the defendant. Though the plaintiff had made some payments to the defendant such payments were made to the account of Miya which is consistent with the contents of the 3rd paragraph of exh. 'SN1'. It is common ground that there was no written or oral contract entered into between the plaintiff and the defendant where the plaintiff had undertaken to assume or bear the contractual liability of Miya *vis-a-vis* the defendant; there being neither a novation or subrogation agreement here. Thus, the question of lack of privity of contract between the plaintiff and defendant was in serious contention. It is trite law that a party assisting a third party to meet its financial obligations to a second party does not bind the party with privity of contract with the second party, *a fortiori*, as in the instant case, where payments had been made perforce and merely to account of Miya, for reasons explained in paras. 12 to 15 of the plaintiff's affidavit (encl. 2). Paragraph 12 of encl. 2 reads:

> 12. It has already been explained to the Defendant much earlier that this letter was addressed to Miya and not to the Defendant and hence cannot be the basis of any agreement between the Joint Venture and the Defendant.
>
> In fact the handwritten word "Agreed" which appears on this letter was written and signed by Miya. This letter evidenced an oral arrangement made between Freddie Yap representing the Joint Venture and Chris Wong representing Miya to progress the Works in that it was agreed as follows:
>
> 12.1 In the event the Defendant did not receive payment from Miya in respect of scaffolding work under the Project; then
>
> 12.2 Miya will agree that the Joint Venture shall make payment to the Defendant from monies that the Joint Venture owed to Miya;
>
> 12.3 These sums would be for the account of Miya.

> Implicit in this arrangement is the fact the Joint Venture would only be in a position to make payment to the Defendant for monies owed to the Defendant by Miya if and only if any monies were due from the Joint Venture to Miya.
>
> Consistent with this arrangement, the Joint Venture had in the past made direct payment to the Defendant at the time when monies were still believed to be due to Miya from the Joint Venture.

The plaintiff's contention that there was never any privity of contract between the plaintiff and the defendant is, in my view, consistent with the fact that though the defendant's invoices with Miya date back to 25 July 2001, it was only in March 2004 (some two years and 10 months later) that the defendant had made the first demand to the plaintiff for payment. Indeed, the following excerpts from a series of contemporaneous documents adduced (in encl. 7) by, and the conduct of the defendants themselves would bear out the contention that the plaintiff has never been considered a debtor:

In plaintiff's letters dated:

(a) 11 October 2001 (exh. SN2 of encl. 7), they said:

> It will be kind of you to give your assistance in payment matters whereby we could pay our workers and continue the work without delay to the project.

(b) 25 February 2002 (exh. SN4 of encl. 7) reads:

> RM Leopad is very disappointed that SSC has not shown any concrete intent in helping us in this matter in spite of the fact that RM Leopad has always been loyal to SSC and made sure that all SSC's demands to execute and complete all the necessary scaffolding work at Manjung Power Station within tight schedule was always carried out with full commitment.

(c) 26 May 2003 (exh. SN5 of encl. 7) states:

> With reference to the matter above and my discussion with your goodself, I personally would like to extend my gratitude and appreciation to Sime for their care and concern **towards their indirect sub-contractor.** (the Defendant – emphasis added)

Consequently, I am abundantly satisfied that there are *bona fide* and substantial disputes on the defendant's alleged claim and the defendant has failed to establish a debtor-creditor relationship between the plaintiff and the defendant. Hence, no question arises as to the plaintiff being "unable to pay" or "neglected to pay" within the meaning and purport of s. 218(2) of the Act. I

find this to be an abuse of the process of the court, as the intention of the defendant company was to bring unwarranted pressure to bear on the plaintiff company to settle a vigorously and cogently disputed debt. The injunction as prayed by the plaintiff must be and is allowed with costs.

Finally, it may perhaps be appropriate, in the context of the current case, to express my ready concurrence with the views expressed by Sir John Pennycuick in *Bryanston Finance* about the 'clumsy and inapposite' form of procedure often adopted by a plaintiff company which seeks relief in terms of the aforesaid non traditional, first specie of injunction. It is, in my view, an inappropriate procedure if the real and predominant purpose of the application is only to restrain the filing of a winding-up petition, as happened in *Bryanston*. This inapposite procedure is a common phenomenon in my Commercial Division, which creates an artificial backlog of civil suit files. This artificial back-log occurs when the file bearing the writ itself (encl. 1) is not closed after the final disposal, *vide inter parties* hearing, of the related summon-in-chambers (which bears a different and subsequent enclosure number) for injunction. For this reason I would commend the mode of procedure adopted by the plaintiff in the present case, as I have, since I assumed office over three years ago as head of the Commercial Division, directed my division to accept certificates of urgency where such applications for injunctions (merely to restrain the filing of winding-up petitions) have been made under originating summons coupled with summons-in-chambers.